No. 76-422

In the Supreme Court of the United States

OCTOBER TERM, 1976

E. C. DOTHARD, ET AL., APPELLANTS

v.

BRENDA M. MIETH, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether minimum height and weight requirements for employment as State prison guards that disqualify approximately 40 percent of women but less than 1 percent of men and that are not shown to be job related violate Title VII of the Civil Rights Act of 1964 and the Fourteenth Amendment.

2. Whether a State regulation that excludes women from employment as prison guards in all-male penitentiaries violates Title VII.

INTEREST OF THE UNITED STATES

The United States is charged with responsibility for enforcement of equal employment opportunity rights under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (and Supp. V) 2000e *et seq.* In particular, the Attorney General has authority under Sections 706(f) and 707 of the Act, 42 U.S.C. (and Supp. V) 2000e–5(f) and 2000e–6, to bring civil actions against State and local governments and governmental agencies that have allegedly engaged in unlawful employment practices. Pursuant to that responsibility, the United States has initiated litigation in several cases challenging the legality of minimum height and weight requirements for employment in law enforcement positions.[1]

A decision regarding the legality of height and weight requirements for prison guards will also affect the enforcement responsibilities of the Law Enforcement Assistance Administration (LEAA), which has responsibility "to assist State and local governments in strengthening and improving law enforcement and criminal justice * * *" (42 U.S.C. (Supp. V) 3701) under Title I of the Omnibus Crime Control and Safe

[1] See, *e.g.*, *United States* v. *State of North Carolina, et al.*, C.A. No. 75–0328–Civ. 5 (E.D. N.C.) (state troopers); *United States* v. *City of Philadelphia, et al.*, C.A. No. 74–400 (E.D. Pa.) (police); *United States* v. *City of Los Angeles*, C.A. No. 72–1806 (C.D. Calif.) (fire); *United States* v. *City of Chicago, et al.*, C.A. No. 73C–2080 (N.D. Ill.) (police); *United States* v. *City of Buffalo, et al.*, C.A. No. 1973–414 (W.D. N.Y.) (fire and police); *United States* v. *Jefferson County, Alabama, et al.*, C.A. No. 75–P–06665 (N.D. Ala.) (county and city law enforcement officers).

Streets Act of 1968, as amended, 87 Stat. 197, 42 U.S.C. 3701 (and Supp. V) *et seq.* In making grants to State and local governments under the provisions of that Act, the LEAA is responsible for assuring that (Section 518(c)(1), 42 U.S.C. (Supp. V) 3766):

> [n]o person in any state [is] on the ground of * * * sex * * * excluded from participation in, * * * denied the benefits of, or * * * subjected to discrimination under any program or activity funded in whole or in part with funds made available under [the Act].

Pursuant to its responsibilities, LEAA has promulgated regulations which provide as follows (28 C.F.R. 42.203(d), 42 Fed. Reg. 9497–9498 (1977)):

> The use of a minimum height or weight requirement which operates to disproportionately exclude women and persons of certain national origins * * * is a violation of this subpart, unless the recipient is able to demonstrate convincingly, through use of supportive factual data that the requirement has been validated * * *.[2]

STATEMENT

Dianne K. Rawlinson, a 22-year-old woman whose height was 5'3" and weight was 115 pounds applied in September 1974 for a position as Correctional Coun-

[2] The standard for validation is found in 28 C.F.R. Part 50, the Department of Justice Guidelines on Employee Selection, 41 Fed. Reg. 51735–51743 (1976). The nondiscrimination provision of the Act may be enforced, *inter alia*, through termination of funding after an administrative hearing (42 U.S.C. (Supp. V) 3757) and by the Attorney General's institution of a civil action when he has reason to believe that a pattern or practice in violation of that provision is occurring (42 U.S.C. (Supp. V) 3766(c)(3)).

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selor trainee with the Alabama Personnel Board (J. S. 5).[3] The Personnel Board refused Ms. Rawlinson employment solely because she failed to meet the minimum weight requirements of Alabama Code, Title 55, § 373(109) (1973 Supp.) (J.S. 5; A. 174–175).[4] That section establishes a statutory weight minimum of 120 pounds and a height minimum of five feet two inches for employment as a state law enforcement officer.

After receiving her letter of rejection, Ms. Rawlinson filed a charge with the Equal Employment Opportunity Commission in Birmingham, Alabama, challenging the minimum height and weight requirements as sexually discriminatory and received a right to sue letter from the Commission (J. S. App. 30–31). On December 8, 1975, she filed a complaint in the United States District Court for the Middle District of Alabama on behalf of herself and other similarly situated women, challenging the height and weight minimums as violative of Title VII and the Fourteenth Amendment to the Constitution, and a three-judge court was convened (A. 7–22; J.S. App. 17). During the pendency of the suit, the Alabama Board of Corrections promulgated Administrative Regulation 204, which allows for selective certification of positions requiring personal contact with inmates

[3] Descriptions of the position of Correctional Counselor Trainee and that of Correctional Counselor I appear at A. 29–32.

[4] Alabama personnel officials did not inform Ms. Rawlinson of the possibility that a waiver of the weight requirement could be sought (J.S. App. 29–30).

("contact positions") as restricted to employees of one sex in institutions in which the inmates are of only one sex (A. 95–97, 176–177).[5] In an amended class action complaint, filed on March 4, 1976, Ms. Rawlinson challenged Regulation 204 as violative of 42 U.S.C. 1983, Title VII, and the Fourteenth Amendment (A. 95–97, 176–77).

At trial, appellees introduced evidence showing that the combined effect of the State's 5′2″ and 120 pounds minimum height and weight requirements is to exclude 41.13 percent of women between the ages of 18–79 while excluding less than one percent of men in the same age group (J.S. App. 32). The district court held that this showing established a *prima facie* case of sex discrimination under Title VII, and shifted the burden to the State to show that the height and weight requirements are job related. See *Griggs* v.

[5] Regulation 204 (App. 36–38) requires correctional institutions to identify the Correctional Counselor positions which they feel require selective certification as male or female positions and to request in writing that the positions be so designated. The criteria to be utilized in establishing the need for selective certification are as follows:

A. That the presence of the opposite sex would cause disruption of the orderly running and security of the institution.

B. That the position would require contact with the inmates of the opposite sex without the presence of others.

C. That the position would require patroling dormitories, restrooms, or showers while in use, frequently, during the day or night.

D. That the position would require searching inmates of the opposite sex on a regular basis.

E. That the position would require that the Correctional Counselor Trainee not be armed with a firearm.

Duke Power Co., 401 U.S. 424. The state offered witnesses who testified that the prison guard duties required a minimal level of strength and that height and weight are generally related to strength (J.S. App. 40). Two witnesses for appellees testified that "height and weight requirements have absolutely no relationship to the duties performed by a correctional counselor" (J.S. App. 40). The court concluded (J.S. App. 41):

> If strength is an important qualification for a prison guard, then the Board of Corrections should adopt a test for its applicants that does in fact measure strength. The crude rule of thumb provided by height and weight levels impermissibly restricts qualified individuals without giving them an opportunity to demonstrate their merit.[8]

The court enjoined the appellant State officials from denying Ms. Rawlinson, and the class she represents, employment as Correctional Counselors solely on the basis of their failure to meet minimum height and weight requirements (J.S. App. 50).

The district court also enjoined State officials from enforcing Administrative Regulation 204 (J. S. App. 50). Appellees had introduced evidence showing that

[8] The court found that, although a valid waiver provision might save the statute, the State did not inform applicants of the right to request a waiver and the procedures for administering waiver requests did not comport with fundamental fairness (J.S. App. 42). The court concluded that the minimum height and weight requirements violated Title VII (J.S. App. 42). It is not clear whether the district court also considered the restrictions violative of the Equal Protection Clause. See J.S. App. 39–40.

as a result of selective certification, women are excluded from all but a few positions in the four major institutions that employ more than 75 percent of the state's correctional counselors (see Table at J. S. App. 26). Appellants did not deny that the regulation discriminates on the basis of sex, but sought to justify it as a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * *" (Section 703(e) of the Act, 42 U.S.C. 2000e–2(e)). Specifically, appellants claimed that women could not adequately and safely perform the duties of a correctional counselor in an all-male penitentiary and that their presence would compromise the privacy rights of inmates (J. S. App. 43). However, on the basis of evidence showing that Alabama employed women in contact positions at other all-male correctional institutions (J. S. App. 43), that the presence of women contributes to the normalization of the prison environment (J. S. App. 44), and that only a small percentage of the correctional counselor's work force is involved in activity implicating prisoners' privacy rights (J. S. App. 45), the district court concluded that appellants had not demonstrated that gender was a bona fide requirement—especially because "procedures may be arranged so as to alleviate much of the legitimate inmate concern for privacy, short of denying women the job" (J. S. App. 45). The court accordingly held that "Regulation 204, insofar as it denies women jobs as prison guards in all-male pris-

ons, is violative of Title VII and the Equal Protection Clause" (J. S. App. 45).

SUMMARY OF ARGUMENT

Appellants' challenge to the constitutionality of Title VII as applied to the States is not properly before the Court. These issues were never certified to the Attorney General pursuant to 28 U.S.C. 2403, were neither raised before, nor considered by, the court below, and they should not now be considered by this Court. Consideration of appellants' constitutional claims is also precluded by their failure to assert those claims in their Jurisdictional Statement.

The three-judge district court properly held that appellants' minimum height and weight requirements for correctional counselors, which eliminate more than 40 percent of potential female applicants and less than one percent of males (J.S. App. 32, 35), violate Title VII. This disproportionate exclusion of women triggers the Title VII requirement of demonstrating that the standards have a "manifest relationship to the employment in question." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 432. Under Title VII, the discriminatory effect of a challenged practice, without regard to any past or present intentional discrimination, requires that the practice be validated in terms of job performance. *General Electric Co.* v. *Gilbert,* Nos. 74–1589 and 74–1590, decided December 7, 1976, slip op. 10–11; *Washington* v. *Davis,* 426 U.S. 229; Equal Employment Opportunity Council Guidelines, 41 Fed.

Reg. 51736. These standards of Title VII enforcement apply equally to private and governmental defendants. See H.R. Rep. No. 92–238, 92d Cong., 1st Sess., p. 17 (1971).

The district court properly concluded that the appellants had not demonstrated that the height and weight standards were supported by "business necessity." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431. Appellants' witnesses testified that the standards were generally related to strength, and that strength was "an extremely desirable requirement" for a correctional counselor (A. 113–114). Appellees' expert witnesses testified that "height and weight requirements have absolutely no relationship to the duties performed by a correctional counselor" (J.S. App. 40). At any rate, appellants were unable to identify the source of the particular standards or to demonstrate that the particular heights and weights chosen correlate to any defined minimum strength requirement. These arbitrarily set standards were shown to be based only on vague generalities and assumptions and are not "demonstrably a reasonable measure of job performance." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 436. Because these standards were not in any fashion validated and "impermissibly restrict[ed] qualified individuals without giving them an opportunity to demonstrate their merit" (J.S. App. 41), they violate Title VII.

Although Administrative Regulation 204 authorizes certification of job positions as either male or female, it is applied to exclude women from employment in

nearly 75 percent of correctional counselor positions. Cf. *Shelley* v. *Kraemer,* 33 U.S. 1, 22. Because it operates as a sex-based classification, it violates Title VII in the absence of a showing that sex is a "bona fide occupational qualification reasonably necessary to the normal operation of [the job]" (Section 703 (e)(1), 42 U.S.C. 2000e–2(e)(1)). The district court properly applied the "bfoq" exception to require a factual basis for the exclusion of women rather than the mere invocation or stereotyped characteristics. See Equal Employment Opportunity Guidelines On Discrimination Because Of Sex, 29 C.F.R. 1604.2(a); *Weeks* v. *Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228, 235 (C.A. 5).

The record before the district court demonstrated that women can perform safely and effectively in male facilities, and were employed by appellees as correctional counselors in contact positions in other all-male state institutions. Appellants introduced no data indicating any physical reason why female correctional counselors could not perform their duties, but rather rested upon paternalistic fears for female safety and speculation concerning prisoner reaction that was based in part upon sexual stereotypes. The district court was entitled to conclude on the basis of the evidence before it that appellants had not met their burden of demonstrating that being male was a bona fide necessary qualification for the job. Similarly, on the basis of evidence indicating the low incidence of "strip search" duties, the court properly concluded that the privacy rights of male inmates could be protected by selective work responsibilities "short of

denying women the job" (J. S. App. 45). Cf. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425.

ARGUMENT

I. APPELLANTS' CLAIM THAT TITLE VII IS UNCONSTITUTIONAL AS APPLIED TO STATE AND LOCAL GOVERNMENTS IS NOT PROPERLY BEFORE THIS COURT

Appellants argue that the extension of the coverage of Title VII in 1972 to include State and local governments is beyond Congress' powers under the Commerce Clause, Article I, Section 8, cl. 3, and under Section 5 of the Fourteenth Amendment, and further, that this extended coverage infringes upon rights reserved to the people and to the states by the Ninth and Tenth Amendments. Appellants acknowledge (Br. 2) that no court of the United States has certified to the Attorney General that the constitutionality of Title VII has been drawn into question. See 28 U.S.C. 2403. The reason is obvious; appellants did not present these constitutional claims to the court below. This Court ordinarily will not consider issues neither raised before, nor considered by, the court below, *Duigan* v. *United States,* 274 U.S. 195, 200; *Husty* v. *United States,* 282 U.S. 694, 701–702; *Lawn* v. *United States,* 355 U.S. 339, 362–363 n. 16; *Adickes* v. *Kress & Co.,* 398 U.S. 144, 147 n. 2. There is no reason to depart from this salutary rule in this case, where appellants have provided no reason why they should be permitted to challenge the constitutionality of important legislation implementing the Fourteenth

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Amendment in a case where no certification was made to the Attorney General under 28 U.S.C. 2403.

Moreover, no constitutional challenge to Title VII is stated or fairly comprised in the questions presented in appellants' Jurisdictional Statement filed with this Court. Rule 15(1)(c) of this Court provides, in relevant part:

> The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court.[7]

This Court has specifically disapproved of the practice of raising additional questions in the brief on the merits, *Irvine* v. *California,* 347 U.S. 128, 129, and has repeatedly refused to consider such questions when so raised, *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U.S. 175, 179; *Phillips Chemical Co.* v. *Dumas Independent School District,* 361 U.S. 376; *J. I. Case Co.* v. *Borak,* 377 U.S. 426.

Since the question of the constitutionality of Title VII is not properly presented, this Court should not consider points I, II, or III of Appellants' brief (Br. 16–38).[8]

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[7] See also Rules 23(1)(c) and 40(1)(d)(2).

[8] If the Court should determine, nonetheless, to reach appellants' constitutional claims, our views concerning the power of Congress to extend Title VII to state and local governments are discussed in the Brief for the United States in No. 76-255, *Hazelwood School District, et al.* v. *United States,* pending for argument in April, 1977. A copy of that brief is being served on counsel for appellants.

II. THE MINIMUM HEIGHT AND WEIGHT REQUIREMENTS VIOLATE TITLE VII SINCE THEY DISQUALIFY A SUBSTANTIALLY DISPROPORTIONATE NUMBER OF WOMEN AND WERE NOT SHOWN TO BE JOB RELATED[9]

A. TITLE VII REQUIRES THAT AN EMPLOYMENT PRACTICE THAT HAS A SEX-BASED DISPARATE EFFECT BE JUSTIFIED BY A MANIFEST RELATIONSHIP TO THE JOB

In enacting Title VII, Congress established a broad prohibition against employment practices that constitute "artificial, arbitrary, and unnecessary barriers to employment" on the basis of "impermissible classification[s]", including race, religion, sex, or national origin. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431. Section 703(a) of the Act, which makes it an unlawful employment practice for an employer "to fail or refuse to hire * * * because of an individual's * * * sex," prohibits employment practices that disparately treat women and men. See *Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542.

Appellants contend (Br. 39–41) that a *prima facie* case of discrimination under Title VII can be shown only where the disparate impact of an employer's practice occurs in the context of a history of past discrimination and that no such history of invidious discrimination by the employer was shown here.[10]

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[9] Since the district court's decision with respect to both the height and weight minimums and Administrative Regulation 204 can be upheld on the statutory ground, there is no need for the court to reach the constitutional issue. See, *e.g.*, *Lau* v. *Nichols,* 414 U.S. 563, 566.

[10] Appellants, however, maintain a system of job assignments for Correctional Counselors that is explicitly sex-based and that

That narrow view of the statute is unwarranted. In *Griggs, supra,* this Court held that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation" (401 U.S. at 431), and emphasized that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation" (*id.* at 432; emphasis in original).[11] In adopting the 1972 amendments extending Title VII to the States, Congress cited *Griggs* and indicated approval of the interpretation of discrimination in Title VII "in terms of 'systems' and 'effects' rather than simply intentional wrongs," S. Rep. No. 92–415, 92d Cong., 1st Sess., p. 5 (1971); H.R. Rep. No. 92–238, 92d Cong., 1st Sess., p. 8 (1971). See, also, *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405; *Gregory* v. *Litton Systems Inc.,* 472 F.2d 631, 632 (C.A. 9); *Wallace* v. *Debron Corp.,* 494 F.2d 674, 676 (C.A. 8). As the Court recently stated in *General Electric Co.* v. *Gilbert,* Nos. 74–1589

excludes women from all but a few positions in the institutions that employ approximately 75 percent of the State's correctional personnel (see discussion *supra*, pp. 6–7). And appellants are certainly aware that the height and weight standard has a substantial relationship to sex. There is thus an element of purposeful exclusion of the protected class involved here.

[11] The courts of appeals have repeatedly held the rationale of *Griggs* to be applicable beyond the context of testing. See, *e.g.*, *Davis* v. *County of Los Angeles*, 13 F.E.P. Cases 1217 (C.A. 9); *Local 53 of Int. Ass'n. of Heat & Frost I. & A. Wkrs.* v. *Vogler*, 407 F. 2d 1047 (C.A. 5); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (C.A. 8); *Green* v. *Missouri Pacific Railroad Co.*, 523 F.2d 1290 (C.A. 8); *Wallace* v. *Debron Corp.*, 494 F.2d 674 (C.A. 8); *Gregory* v. *Litton Systems, Inc.*, 472 F.2d 631 (C.A. 9).

and 74–1590, decided December 7, 1976, slip op. 10–11 (emphasis in original):[12]

> [O]ur cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another.

In *Washington* v. *Davis,* 426 U.S. 229, this Court discussed the difference in standards between an action challenging employment practices under the Fourteenth Amendment and a similar challenge under Title VII. The Court there recognized that (426 U.S. at 246–247):

> [U]nder Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be "validated" in terms of job performance in any one of several ways * * *. However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed.

[12] In *Gilbert*, the Court found that plaintiffs had failed to show that there was a gender-based discriminatory effect in the operation of General Electric's benefit plan.

Finally, the Equal Employment Opportunity Coordinating Council,[13] which is charged by Title VII (Section 715, 42 U.S.C. (Supp. V) 2000e–14) with the responsibility, *inter alia,* for developing policies to maximize effort, promote efficiency and eliminate inconsistency among the operations of the agencies and departments responsible for enforcement of federal equal employment opportunity law, has promulgated a set of guidelines for employee selection procedures (41 Fed. Reg. 51734 *et seq.* (1976)).[14] The guidelines provide that (41 Fed. Reg. 51736, 51744, 51752 (1976)):

> [t]he use of any selection procedure which has an adverse impact on the members of any racial, ethnic or sex group with respect to any employment decision will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure is validated * * *.

This administrative interpretation of Title VII by the enforcing agencies merits deference by the courts, especially where the legislative history of the statute supports the agencies' construction. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 434; *Trafficante* v. *Metro-*

[13] The Council is composed of the Department of Labor, the Equal Employment Opportunity Commission (EEOC), the Civil Rights Commission, the Civil Service Commission, and the Department of Justice.

[14] The guidelines were adopted only by the Departments of Labor and Justice and the Civil Service Commission. The EEOC has determined that the guidelines do not represent the views of that agency. However, that agency's existing guidelines also define discrimination under Title VII in terms of the adverse effect of employee selection procedures, 29 C.F.R. 1607.3.

politan Life Insurance Co., 409 U.S. 205, 210; *Lau* v. *Nichols,* 414 U.S. 563, 571.[15] A showing that minimum height and weight requirements operate as a sex-based classification, by disproportionately excluding women, triggers the Title VII requirement that appellants demonstrate their "manifest relationship to the employment in question." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432.

B. APPELLEES DEMONSTRATED A DISPARATE IMPACT THAT WAS NOT SHOWN TO BE JUSTIFIED BY BUSINESS NECESSITY

In this case, the three-judge court found that plaintiffs have proved a *prima facie* case of discrimination on account of sex by virtue of the fact that the minimum height and weight requirements for Correctional Counselor positions eliminated more than 40 percent of the potential female applicants while excluding less than one percent of males.[16] This showing shifted to

[15] The guidelines are intended to apply, as well, to other federal laws concerning equal employment opportunity, including Executive Order 11246 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303. They are utilized also by LEAA in fulfilling its enforcement responsibilities under 42 U.S.C. (Supp. V) 3766 (see discussion *supra*, pp. 2–3). These guidelines are consistent with the intent of Congress in enacting Title VII, are the product of thorough and careful deliberations of the agencies charged with administration of federal equal employment opportunity legislation, and are not inconsistent with prior pronouncements by these federal agencies. Cf. *General Electric Co.* v. *Gilbert*, *supra*, slip op. 16–19.

[16] Although appellants complain that the statistics in evidence do not represent the pool of applicants (Br. 41–42), we agree with appellees that, where interested persons can readily determine whether they meet an objective criterion of employment, many potential applicants may be discouraged from applying (Brief for the Appellees, pp. 34–35). Under such circumstances, the pool of potential applicants provides the only appropriate base for comparison.

the appellants the burden of demonstrating that these employment requirements have a "manifest relationship" to the job of correctional counselor. *Griggs* v. *Duke Power Co., supra.* The district court found that appellants failed to sustain that burden.[17]

Judson Locke, Commissioner of the Board of Corrections, testified in support of the height and weight minimums that, in his view, physical strength is "an extremely desirable requirement" for the correctional counselor because of the potential need to subdue an inmate (A. 113–114). By contrast, testimony of two experts in the correctional field indicated that "height and weight requirements have absolutely no relationship to the duties performed by a correctional counselor" (J.S. App. 40; see A. 191–192, testimony of William R. Nelson and A. 80–83, testimony of C. Robert Sarver).[18] Even strength *per se* is not a necessary requirement since, as both experts agreed, a correctional counselor should not attempt to deal with a confrontation single-handed. "It would be preposterous to proceed alone * * *" (A. 82). "The officer would summon help as quickly as possible * * *" (A. 190). As one expert witness stated (A. 81–82):

> There would be no way, no matter how large or how strong or how heavy or how tall he is, no way in the world he could ever protect himself if they wanted to get him. It wouldn't matter what his sex was.

Even if strength were a valid job requirement, appellants never demonstrated anything more than a speculative relationship between strength and the minimum height and weight requirements chosen. Appellants admit that the statutory requirements are not based upon any scientific validation study (Br. 45).[19] Their basis is mere assumptions that height and weight are related to strength (A. 114–116) and that the particular minimum heights and weights chosen correlate with a totally undefined strength requirement. Reviewing the testimony of the one witness upon whom appellants relied, the district court said (J.S. App. 40):

> Commissioner Locke's sole contention concerning the job relatedness of these physical requirements was that they were related to strength. Undeniably, body height and weight have some relationship to strength, but we are

[17] The court also had under consideration a height and weight standard for employment of State Troopers that required potential applicants to be at least 5'9" tall and weigh at least 160 pounds in order to qualify for those positions (J.S. App. 18). The court found that the 5'9", 160-pound standard virtually eliminated women from consideration (only 0.68% of women would have met that standard) (J.S. App. 31). While the height and weight minimums for correctional counselors do not result in as great a degree of exclusion, the disparate effect is within the range that this Court has found significant in other cases. *E.g., Griggs* v. *Duke Power Co., supra*, 401 U.S. at 430 n. 6; *Castaneda* v. *Partida*, No. 75–1552, decided March 23, 1977, slip op. 13.

[18] Mr. Nelson is the Warden of the Metropolitan Correctional Center in Chicago, Illinois, a federal maximum security facility. He had, at the time of his testimony, more than twenty years' experience in the correctional field (A. 178–179). Mr. Sarver is the former Commissioner of the Arkansas Department of Corrections (1968–1971) and was Director of the West Virginia Department of Corrections from 1966–1968 (A. 73).

[19] Validation of a standard such as that at issue here does not require proof to a mathematical certainty as asserted by appellants (Br. 45–46). It does, however, require the use of "supportive factual data" to show that the standard has a factual relationship to the job in question. See LEAA Regulations, *supra.*

> unconvinced that a person below an arbitrarily defined level would invariably lack the necessary strength to perform the required tasks.

The Executive Director of the Alabama Peace Officers Standards and Training Commission, Mr. James Jackson, could not say how the standards were established. He stated (A. 164): "I don't know where they obtained, or whether it was copied from someone else, or what, I don't know." Although the Commission has the power to obtain the services and advice of experts in the field of law enforcement to aid it in adopting standards for employment, it has not done so (A. 165). Nothing in Title VII prohibits the State from establishing a strength requirement, if in fact strength is necessary to the employees' duties. However, as the district court stated: "If strength is an important qualification for a prison guard, then the Board of Corrections should adopt a test for its applicants that does in fact measure strength" (J.S. App. 41). By contrast the test used by appellants "impermissibly restricts qualified individuals without giving them an opportunity to demonstrate their merit" (*ibid.*).

When an employment standard has a substantially disproportionate adverse effect upon a class protected by the statute, Title VII requires the employer to show that the standard is "demonstrably a reasonable measure of job performance" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 436) an employer may not rely upon vague generalities or assumptions. "If an employment practice which operates to exclude Negroes [or other classes protected by Title VII] can-

not be shown to be related to job performance, the practice is prohibited" (*id.* at 431). What this Court stated in *Griggs* in regard to general intelligence tests is equally applicable to arbitrarily chosen physical requirements such as those at issue here. "What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract" (*id.* at 436).

The minimum height and weight requirements here were arbitrarily set. Appellants admit that they cannot be sure that a person who meets these minimums (5′2″, 120 pounds) can always perform the duties of a prison guard, or that a person who falls below the minimum inevitably will not be able to perform (Br. 45). Indeed, the minimums are nothing more than a "crude rule of thumb" (J.S. App. 41). The court below correctly found that these standards for employment were not shown to be necessary for successful job performance—*i.e.*, were not shown to be a business necessity—and are prohibited by Title VII.

Finally, appellants argue that because these employment standards were promulgated by the State legislature, they are entitled to greater deference than standards established by a private employer.[20] Indeed, they argue that the plaintiff should be required to show affirmatively that the standard established by the legislature is not a business necessity

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[20] To the extent that appellants' argument is based upon the Tenth Amendment to the Constitution, it is not properly before this Court for the reasons stated *supra*, pp. 11–12.

(Br. 42–43, 45).[21] By contrast, the legislative history of the 1972 amendments extending Title VII to the states as employers indicated Congress' concern for widespread discrimination in employment by state and local governments and its intention that the same Title VII principles extend to governmental and private employers alike. See H.R. Rep. No. 92–238, *supra,* at 17; S. Rep. 92–415, *supra,* at 10. Nothing in the legislative history of the 1972 amendments suggests that Congress altered the burden of proof in an employment discrimination case where a state statute is challenged. Instead, the Section-by-Section Analysis of the 1972 Act, presented to the House and the Senate at the time the Conference Report was submitted to each body (118 Cong. Rec. 7166–7169, 7563–7567 (1972)) states (*id.* at 7166, 7564):

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

The court below properly placed on appellants the burden of demonstrating that the height and weight minimums bear a manifest relationship to perform-

[21] The burden of proof is properly upon the employer to show the business necessity for its practices (*Griggs*, *supra*, 401 U.S. at 432) since it is in the best position to know what the requirements of its business are and how they can best be achieved. These considerations are equally applicable to both public and private employers.

ance of the job of Correctional Counselor, and correctly held that appellants failed to meet that burden.[22]

III. REGULATION 204, WHICH ALLOWS FOR SELECTIVE CERTIFICATION OF CORRECTIONAL COUNSELORS BY SEX, VIOLATES TITLE VII

Initially, appellants contend that Regulation 204 is a neutral policy not based upon sex because, while it is applied to prohibit women from employment in contact positions in all-male penitentiaries, it may also be applied to prohibit men from working in similar positions in the female penitentiary. This Court has rejected similar arguments in the context of Fourteenth Amendment rights because of the individual and personal nature of the rights created thereby. "[E]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer,* 334, U.S. 1, 22. Since employment in the positions subject to Regulation 204 is based entirely upon the sex of the employee and "Regulation 204 is the administrative means by which the board's policy of not hiring women as correctional

[22] The waiver provision of the statute, as administered by appellants, did not cure the discrimination caused by the height and weight minimums. The district court found that Ms. Rawlinson was not informed of the possibility that she could request a waiver or that the Board of Corrections could request one on her behalf (see A. 173–175), that the Board of Corrections has no standard procedure for informing applicants of their right to seek a waiver and has never exercised its power to request one, and that the administrative procedure for obtaining a waiver is, in any event, "remarkably informal and subjective" (J.S. App. 41, 42) and does not comport with fundamental fairness.

counselors in contact positions in all-male penitentiaries has been implemented" (J.S. App. 25),[23] the court below properly concluded that the Regulation would violate Title VII in the absence of a showing that sex is a "bona fide occupational qualification reasonably necessary to the normal operation" of the job of correctional counselor.

A. THE EXCEPTION FOR BONA FIDE OCCUPATIONAL QUALIFICATIONS SHOULD BE NARROWLY INTERPRETED TO IMPLEMENT THE ENFORCEMENT GOALS OF TITLE VII

Section 703(e)(1) of Title VII, 42 U.S.C. 2000e–2(e)(1), provides that, notwithstanding the Act's general prohibition of discrimination in employment on the basis of sex, it is not unlawful for an employer to hire and employ individuals on the basis of sex "where * * * sex * * * is a bona fide occupational qualification reasonably necessary to the normal operation of [the employer's] business or enterprise * * *." The legislative history of the Act indicates that this provision created a "limited exception"[24] to the general prohibition. Like other such exceptions to remedial statutes, it should be narrowly construed to further

[23] Although the Regulation does affect male Correctional Counselors, the Commissioner of the Board of Corrections testified as follows (A. 128): "Well, I thought that it was clear from the outset that me, my particular policy, and with the support of the Board, * * * that we do not intend to employ females to work in contact positions in all-male institutions."

[24] 110 Cong. Rec. 7213 (1964) (interpretative memorandum of Senators Clark and Case, floor managers of the bill). See also H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

the important public policy of Title VII. See *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493; *Phillips* v. *Martin Marietta Corp., supra*, 400 U.S. at 544–547 (Marshall, J, concurring).

Accordingly, the Equal Employment Opportunity Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604, state:

> The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels—"Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other. [29 C.F.R 1604.2(a).]

The Guidelines specifically note that a "bfoq" exception is not warranted if the refusal to hire an individual is based upon stereotyped characteristics of the sexes. 29 C.F.R. 1604.2(a)(ii).[25]

This administrative interpretation of the "bfoq" exception has been accepted by the courts of appeals that have considered the issue as consistent with the broad remedial purpose of the Act.[26] For example, in *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228, 235 (C.A. 5), the court of appeals con-

[25] The Guidelines recognize that (29 C.F.R. 1604.2(a)(2)):

"Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, *e.g.*, an actor or actress."

[26] See, *e.g.*, *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (C.A. 5); *Rosenfeld* v. *Southern Pacific Co.*, 416 F.2d 711 (C.A. 7); *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385 (C.A. 5), certiorari denied, 404 U.S. 950.

cluded that, in order to rely upon the "bfoq" exception, an employer must show that he has "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." An employer cannot assume, on the basis of stereotyped characterizations of women, that no women can perform a particular job, while treating all men as though they can. *Id.* at 235–236. Any other analysis would deny "desirable positions to a great many women perfectly capable of performing the duties involved" (408 F. 2d at 236). See also *Rosenfeld* v. *Southern Pacific Co., supra,* 444 F. 2d at 1224–1225; *Bowe* v. *Colgate-Palmolive Co., supra,* 416 F. 2d at 717.

B. APPELLANTS DID NOT DEMONSTRATE THAT WOMEN AS A CLASS COULD NOT PERFORM SAFELY AND EFFICIENTLY

Appellants attempted to justify the exclusion of women from contact positions in the all-male maximum security institutions under two theories: first, that "women would not be able to perform adequately and safely within the setting of an all-male penitentiary" (J. S. App. 43), and second, that the male prisoners' right to privacy would be violated by having female correctional counselors in contact positions (*ibid.*). Applying the principles of the Equal Employment Opportunity Guidelines, and the cases cited *supra,* the court correctly held that appellants failed to carry their burden of establishing that they came within the "bfoq" exception.

Appellants' attempt to justify the exclusion of women from contact positions in all-male penitentiaries was based, in substantial part, upon stereotyped characteristics of the sexes, contrary to Congress' intent and the Equal Employment Opportunity Commission's Guidelines, and, to the extent it was based on other considerations, the district court was warranted in crediting the weighty countervailing evidence on this issue introduced by the complainants and rejecting appellants' defense.

The Commissioner of the Board of Corrections, Judson Locke, testified, in deposition, that the decision whether to employ women as guards was based in part upon the Southern attitude regarding the roles of males and females (A. 111–112), that another important consideration was the psychological built-in distinction between the way an inmate views a female as opposed to a male guard (A. 117–118), and that if a woman guard were taken hostage, the situation would necessarily be handled differently than if a male were taken hostage (A. 144). He also stated (A. 111):

> there is a basic difference in the—between a female and a male, which renders her less capable of physically subduing or protecting herself or subduing an inmate, should the occasion arise, and also part of that would be the—her mere physical presence, in my opinion, and other people's opinion, would incite trouble and there is a sexual connotation which should go without saying. She is a sex object. And you have inmates who are deprived of

sexual outlets, hetero-sexual outlet, and should be obvious. It is to me.[27]

Similarly, Mr. Bill Gilmore, Director of the Frank Lee Youth Center, a minimum security facility for youthful first offenders, testified that a female guard commanded less respect from the inmates than the male counselors due to the feelings of the inmates "about the role of a female and where her function is in society" (A. 292). He analogized the situation of female guards and male inmates to the attitudes of children toward their parents, with the mother being viewed as soft and the father as the authority figure (A. 291, 301).

Appellants thus sought to justify the preclusion of women from 70 percent of the correctional counselor jobs in the Alabama State system not by any practical data indicating that women cannot perform the role, but rather by a combination of speculative fears for safety based upon sex stereotypes imputed to prisoners and "romantic paternalism" on the part of the employer.[28] Cf. *Weeks* v. *Southern Bell Telephone & Telegraph Co., supra,* 408 F. 2d at 236. An interpreta-

[27] Mr. Tony Sewell, Director of the Mobile Work Release Center, had supervised two women out of a staff of seven for a period of one year (A. 251–252). He testified that in his opinion the women are not able to perform all the duties of a correctional counselor as capably as the men (A. 252). On cross-examination he admitted, as the district court noted (J.S. App. 43), that one of the two women was, in fact, a good employee and that he based his opinion upon the behavior of the other woman (A. 271).

[28] Although appellants emphasize the dangerous conditions which exist in the Alabama prison system (Br. 44), Commissioner Locke acknowledged (A. 120–121) that the state is subject to a federal court order requiring it to implement a classification system for inmates, eliminate overcrowding, and hire additional guards, and that "[t]he danger will be considerably reduced" when those actions are taken (A. 121). See also testimony of C. Robert Sarver (A. 83–84). The federal court order to which Commissioner Locke referred is found in *Pugh* v. *Locke*, 406 F. Supp. 318, 331–335 (M.D. Ala.), appeal docketed May 10, 1976, No. 76–2269.

In any event, the fact that the job of prison guard involves an element of danger is not sufficient to establish that women cannot perform it and, thus, that sex is a bona fide occupational qualification for the job. To the extent that the job of a prison guard in the Alabama all-male penitentiaries is a dangerous one, it is dangerous for both men and women. Appellants refer (Br. 44) to the testimony of Commissioner Locke that two guards were killed in 1974 and many guards have been wounded in assaults within the past three years (A. 119–120). Ms. Rawlinson was shown a picture of the body of one of the fatally wounded guards during her deposition and was asked whether she thought that brute strength would be important in stopping altercations. She replied, referring to the picture which showed multiple stab wounds, "It didn't help him very much" (Record p. 409).

tion of the bona fide occupational qualification rule that would permit the exception to be established merely on the basis of opinions based upon sex stereotyping or paternalistic feelings for women would allow the exception to "swallow the rule" (*id.* at 235).[29] In any event, the district court here properly found that the balance of the evidence demonstrated that the adverse effects claimed by appellants were illusory (J.S. App. 43–44).

[29] Appellants incorrectly rely upon the opinions expressed in a letter of December 18, 1975, from the General Counsel of the Equal Employment Opportunity Commission (Br. 35). The letter recites specifically that it "is not an opinion letter pursuant to 29 C.F.R. § 1601.30" (A. 39) within the meaning of Section 713(b) of Title VII, 42 U.S.C. 2000e–12(b)(1). The effect of that recitation

Appellees presented the testimony of Mr. William R. Nelson, Warden of the Metropolitan Correctional Center in Chicago, a federal maximum security institution. Mr. Nelson testified that before he started working with women as correctional officers in male facilities he had many concerns about their ability to function effectively in such a situation (A. 183–184), but that based upon his experience (A. 185):

> The performance of the women is very satisfactory and you cannot compare them as one sex to another. I would say, if you were comparing sex, there is no difference * * *.

He stated that the reaction of inmates to women is generally positive (A. 186) and that their presence has had a normalizing effect upon the institution.[30]

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is that reliance upon any statements made in that letter may not be used as a defense under Title VII, see *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F. 2d 980, 997 (C.A. 5). In any event, that letter (A. 38–43) does not purport to approve appellants' policy, but merely points out some of the court decisions which have faced the issue and suggests some guidelines for the State of Alabama to follow.

As to the suggestion in the letter that the State continue, wherever possible, to employ male correctional personnel at all-female correctional institutions (A. 43), appellants do not mention that a typographical error resulted in a portion of the suggestion being omitted from the original letter. A corrected letter was later sent to the Commissioner of the Board of Corrections (A. 246–247). The omited portion of the letter suggested that the State also continue, wherever possible, to employ female correctional personnel in the all-male institutions.

[30] The Federal Prison System, Policy Statement No. 3713.7, dated January 7, 1976, states (J.S. App. 44): "The Bureau of Prisons is committed to the goal of normalization as a part of improving the correctional facilities. This integration of staff of both sexes into all institutions will promote this development."

In his view, the behavior of the men has improved because (A. 187):

> When a woman is on the unit, the men will behave more civilly, more normally. They must project an image which is compatible with the presence of a member of the opposite sex, as would be in any social setting.[31]

Finally, the district court was entitled to conclude that the credibility of appellants' speculations on prisoner reactions was undercut by the undisputed fact that the State "employ[s] females in contact positions at all-male institutions other than the four large penitentiaries * * * who perform the identical duties of their male colleagues, with the exception [of] naked searches and frisks * * *" (J. S. App. 43). The court below correctly ruled on the basis of this record that appellants had not satisfied the bona fide occupational qualification exception and properly rejected appellants' defense that all or most women would be unable to perform the duties involved in the positions under consideration.

C. THE INMATES' RIGHTS OF PRIVACY CAN BE RECONCILED WITH PLAINTIFFS' RIGHT TO EMPLOYMENT

Appellants' second justification is that the exclusion of women from contact positions in all-male penitentiaries is required in order to preserve the right of privacy of the male inmates. Where no accommodation could be made with inmates' rights to privacy in such matters as strip searches and the

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[31] See also A. 79 (testimony of C. Robert Sarver).

use of bathroom facilities, sex could be a bona fide occupational qualification. However, the district court found on the evidentiary record in this case that such a practical accommodation was feasible and that the evidence presented did not demonstrate that a sex qualification was "reasonably *necessary* to the normal operation" (Section 703(e), 42 U.S.C. 2000e–2(e)) of the four penitentiaries.

The record indicates that appellants themselves have accommodated the privacy rights of inmates in all-male non-penitentiary institutions where women correctional counselors are employed (J.S. App. 43–44) and that it is quite possible "to separate the sexual from the nonsexual aspects of the job." Developments in the Law, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1183 (1971). The testimony of appellants' employees also demonstrates that procedures can be established to enable women to perform as correctional counselors, while ensuring bathroom privacy.[32] Federal Warden William Nelson testified that the women he supervises perform all of the duties that the male guards perform with the exception of strip searches of the male prisoners (A. 184). Yet nothing in the record indicates that appellants, like the federal warden, could not restrict the duties of women to avoid

[32] For instance, Mr. Sewell testified that it was his policy that, when performing a head count to determine whether all inmates are present, the female guard should not enter the bathroom area but should remain at the door until the inmate emerges so that she can assure by visual contact that he is present in the prison (A. 278).

strip searches while "still utili[zing] women so they perform an effective function within the institution" (A. 219). The evidence indicates that strip searches are such a minimal element in the correctional counselor's duties that they could hardly provide a rationale sufficient to classify sex as a "necessary" qualification for the correctional counselor's position. Indeed, at two of the four penitentiaries at issue, no systematic strip searches are conducted (A. 102, 105); at the others, only approximately 25 percent of the guards perform systematic strip searches (A. 103–104). At most, therefore, appellants have shown a need for some men to be included in the complement of correctional counselors at the penitentiaries—a showing that falls far short of justifying the complete exclusion of women from such employment.

In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425, this Court stated that where a complaining party under Title VII can demonstrate that other employment selection devices without an undesirable racial effect (or, as here, sexual effect) would also "serve the employer's legitimate interest in 'efficient and trustworthy workmanship,'" such a showing would be evidence that the selection device was a pretext for discrimination.[33] The record here demonstrated the

[33] Similarly, the doctrine of business necessity which has evolved under Title VII requires a finding that there is no acceptable alternative available which would accomplish the stated business purpose with a less discriminatory impact. See *Robinson* v. *Lorillard Corporation*, 444 F. 2d 791, 798 (C.A. 4), certiorari dismissed, 404 U.S. 1006, 1007; *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870, 879 (C.A. 6).

existence of alternative means of protecting inmates' privacy rights, and the court was justified in concluding (J.S. App. 45) that the:

> tension between the individual's right to employment without regard to his or her sex and the inmates' right to privacy can be resolved by selective work responsibilities among correctional officers rather than by selective job classifications. * * * We are convinced that procedures may be arranged so as to alleviate much of the legitimate inmate concern for privacy, short of denying women the job. See *Reynolds* v. *Wise*, 375 F. Supp. 145, 151 (N.D Tex. 1974).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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